SEP 23 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-322

MICHAEL SANTO POLIZZI, JACK S. SHAPIRO, PETER JAMES BELLANCA, ARTHUR J. ROOKS and ANTHONY JOSEPH ZERILLI,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Arthur J. Rooks and Anthony Joseph Zerilli, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on April 30, 1974.

OPINIONS BELOW

Petitioners, together with Anthony Giordano of St. Louis, Missouri, and Emprise Corporation, a New York corporation, were defendants jointly tried in the United States District Court

for the Central District of California. Petitioners and their co-defendants separately appealed to the United States Court of Appeals for the Ninth Circuit, and the appeals were consolidated in the Court of Appeals.

The consolidated cause was decided by a panel of the United States Court of Appeals on April 30, 1974. Each of the three judges wrote separate opinions on the issues raised on appeal, each judge writing on different issues. The opinions have not yet been officially reported. They are reproduced as Appendix A hereto.

On July 25, 1974, the Court of Appeals modified the opinions of April 30, 1974, in certain respects and denied petitions for rehearing and rejected suggestions for rehearing in banc. The modifying order has not yet been officially reported. It is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 30, 1974. (See Appendix B.) Timely petitions for rehearing, with suggestions of appropriateness of rehearing in banc, were filed within the time as extended by the Court of Appeals. They were denied on July 25, 1974. (See Appendix C.)

On August 10, 1974, Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to September 23, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

A single petition for a writ of certiorari is being filed in behalf of these five petitioners, pursuant to Rule 23(5) of this Court. Separate petitions are also being filed in behalf of Anthony Giordano and Emprise Corporation.

QUESTIONS PRESENTED

I

Whether the branding by the Attorney General and the prosecutor of certain petitioners as members of the so-called "Mafia" poisoned the grand jury and all subsequent proceedings so as to deprive petitioners of their Fifth and Sixth Amendment rights to due process of law and a jury trial free of unconstitutional impediments.

II

Whether petitioners were deprived of a fair trial because of prejudicial news publicity, including

A. Whether several in camera interrogations by the trial Court were adequate, and

B. Whether the exclusion of petitioners and their counsel from the interrogation deprived them of Fifth and Sixth Amendment rights.

III

Whether the government's disclosure obligation under *Alderman v. United States*, 394 U. S. 165 (1969), after confession of illegal electronic surveillance, required affirmative admissible evidence of the information obtained and its dissemination, thereby presenting the question of whether all petitioners, including also those not acknowledged to have been surveilled, were accorded a proper *Alderman* hearing in this case.

IV

Whether petitioners were prejudiced by the Court's handling of the Lands transcript, including:

A. the failure to impose sanctions for violation of the Jencks Act (18 U.S.C. § 3500), and

B. the deliberate misrepresentations to the jury by the prosecution, with the approval of the Court, as to its contents.

V

Whether the government's failure to disclose highly unusual leniency agreements and other inducements granted to its key witness, Maurice Friedman, requires a reversal of petitioners' convictions or further remedial action in the light of *Giglio v. United States*, 405 U. S. 150 (1972).

VI

Whether numerous errors throughout these proceedings, acknowledged by the Court of Appeals but characterized in the opinion as non-prejudicial or non-reversible, combined together to cause a prejudicial totality of errors which deprived petitioners of a fair trial and due process of law.

VII

Whether certiorari should be granted for reasons contained in petitions for a writ of certiorari being filed by co-defendants Anthony Giordano and Emprise Corporation who were jointly tried with these petitioners and whose convictions were jointly affirmed with these petitioners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutes of the United States

Title 18, United States Code

§ 1952. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * * *

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially

verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

Petitioners were tried jointly with Anthony Giordano and Emprise Corporation, a New York corporation, on a ten-count indictment. The first count alleged a conspiracy to violate the Travel Act, Title 18, United States Code, Section 1952, and there were nine substantive counts charging violations of § 1952. Rooks, Giordano and Emprise Corporation were charged only in the conspiracy count; the other petitioners were named in some or all of the substantive counts, as well as the conspiracy count.

After numerous pre-trial hearings before a succession of three district judges, trial began on February 15, 1972, before the Honorable David W. Williams in the United States District Court for the Central District of California. The trial lasted for approximately 11 weeks and on April 26, 1972, the jury returned a verdict finding all defendants guilty on the conspiracy count, and various defendants guilty on the substantive counts submitted, with the exception of one count on which the jury was unable to agree upon a verdict as to petitioner Polizzi.

In connection with post-trial motions, a hearing in excess of one week was conducted in the trial Court, primarily on the question of the taint of admittedly illegal electronic surveillance directed against several defendants. All post-trial motions were overruled, and petitioners were sentenced as follows:

Polizzi—six counts—four years imprisonment and a $40,000.00 fine (55 R.T. 10,939-10,941).*

Shapiro—six counts—three years imprisonment and a $30,000.00 fine (55 R.T. 10,953-10,954).

Bellanca—seven counts—five years imprisonment, suspended on condition that he spend 179 days in a jail-type institution, and a $20,000.00 fine (55 R.T. 10,984-10,986).

Rooks—one count—five years imprisonment, suspended on condition that he spend 90 days in a jail-type institution, and a $10,000.00 fine (55 R.T. 10,996-10,997).

Zerilli—eight counts—four years imprisonment and a $40,000.00 fine (55 R.T. 10,930-10,931).

As to the other defendants, Giordano was sentenced on one count to four years imprisonment and a $10,000.00 fine (55 R.T. 10,973), and Emprise Corporation was sentenced on one count to a fine of $10,000.00 (55 R.T. 10,920). Execution of all of the sentences has been stayed pending determination of the petitions for writ of certiorari.

The issue of whether there was a submissible case was presented to the Court of Appeals and ruled adversely to petitioners, although the evidence was not discussed as to these petitioners. (See Section XVII of Opinions below, App. A-70 to A-71.) These petitioners are not presenting a question of the sufficiency of the evidence in this petition. Accordingly, the evidence will not be stated herein except to the extent that it may be relevant to the questions presented by this petition. (For a detailed statement of the facts, if desired, the Court's atten-

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* As used herein, "R.T." refers to the Reporter's Transcript by volume and page. "Z.C.T." refers to the larger Clerk's Transcript submitted in conjunction with the appeals of Zerilli et al. There was also another Clerk's Transcript in the Emprise Appeal.

tion is directed to a separate volume of Appellants' Statement of Facts filed in the Court of Appeals. A copy thereof is being filed with the Clerk of this Court.)

Petitioners believe that many errors took place during the trial. Many of them were recognized as such by the Court of Appeals in the opinions of April 30, 1974. Not all such errors are being presented in this petition, but because of the magnitude of this case and the number of major errors and significant questions involved, the number of questions presented by this petition is larger than may be customary for petitions for writ of certiorari.

A brief synopsis of the facts would, we believe, be useful to this Court in getting an overview of the background of this case:

The events took place in 1966 and 1967. They started when one Maurice Friedman began to organize a group to build and operate a hotel and gambling casino in Nevada, to be known as the Frontier Hotel. Early in his activities when his initial prospective investors were not producing as he expected, he was in contact with Polizzi and Zerilli as to their possible investment in the hotel and casino. It soon developed that Polizzi and Zerilli might have difficulty in obtaining approval from the gambling authorities in Nevada to become stockholders, apparently because of Zerilli's ownership interest and managerial position with a pari-mutuel race track in Detroit and other background investigations.

Subsequently petitioner Shapiro became interested in participating in the hotel and casino and secured others from the Detroit area as potential investors. Petitioner Bellanca, a licensed attorney in Detroit, performed numerous legal services for the potential investors, and he and Shapiro, as well as other investors, made numerous trips between Detroit and Las Vegas. Some of these trips involved stopovers in Los Angeles for plane

connections—on this basis, the government alleged venue in Los Angeles. During this period of time, Zerilli and Polizzi also traveled to Las Vegas, generally for vacation reasons, but occasionally they would discuss their own possibilities of investment. In addition, Polizzi, who was in the plumbing supply business, sold the plumbing fixtures to the hotel.

Petitioner Rooks was an investor in the enterprise and borrowed money from Emprise Corporation. Giordano, a resident of St. Louis, was apparently charged with being responsible for an investment by a Mr. Sansone of St. Louis; the sufficiency of the evidence as to Giordano is presented in his separate petition for a writ of certiorari.

Ultimately the hotel was licensed and opened for business in July, 1967. By that time, Friedman had withdrawn from the project because of other legal problems which he had, including a Travel Act violation involving cheating at card games, which later gave rise to additional offenses, viz., theft of grand jury transcripts and obstruction of justice for bribery of a witness. See *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), and *United States v. Friedman*, 445 F. 2d 1076 (9th Cir. 1971), for some indication of his nefarious conduct.

When the hotel opened, it had some financial problems, including pressure from the landlord and his representative, Louis Feil. Ultimately the investors were forced to sell the hotel to the Howard Hughes interests in November, 1967. All of the investors received their full investment upon the sale to the Hughes organization.

The key government witness was Maurice Friedman who, at the time of trial, was under sentence for his various federal convictions. Although there was strenous denial by the government of any deals with Mr. Friedman, all of his sentences were reduced to the period of time served, with the approval of the prosecutor in the instant case, and he was released from custody

within six weeks after the conclusion of this trial. An issue under *Giglio v. United States*, 405 U.S. 150 (1972), is involved and presented in Question V of this petition. Without Friedman's testimony, no case would have been made. Petitioners believe that no case was made even with his testimony, and that there was no violation of the Travel Act. (See Question I of petition for writ of certiorari filed by Emprise Corporation.)

There was much disagreement during trial between government counsel and defense counsel and between defense counsel and the Court. The evidentiary mistakes of the Court, the atmosphere of the trial, and misconduct of the prosecutor sanctioned by the Court all created an aroma of guilt which permeated the trial and prevented petitioners from having a fair trial. Many such errors were acknowledged by the Court of Appeals.

After conviction, overruling of post-trial motions, and sentencing, all of the defendants appealed to the United States Court of Appeals for the Ninth Circuit. The cause was argued as a consolidated matter on September 5, 1973, and three opinions were filed by a panel of the Court (including one District Judge) on April 30, 1974. (See Appendix A for the opinions.) On July 25, 1974, petitions for rehearing were denied by the Court of Appeals, and some modifications of the original opinions were made. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

"Mafia" Enemies List

In 1969 former Attorney General Mitchell included petitioners Zerilli and Polizzi on a list of alleged members of "organized crime". 115 Cong. Rec., part 17, pp. 23440-23441 (Aug. 12, 1969). That public denunciation of private citizens, never convicted of any crime, by the nation's chief law enforcement officer,* coupled with its prejudicial sequelae in the grand jury, trial, and appellate stages of this case, require a reversal of the convictions because of the denial by the Department of Justice of petitioners' Fifth Amendment right to due process of law and the de facto nullification of their Sixth Amendment right to a jury trial.

The prosecution's harmful use of the Attorney General's list in this case began during the grand jury's investigation (App. A-34).** On June 11, 1970, prosecutor Nissen asked Abe Phillips in the grand jury: "Are you telling us you did not know Tony Zerilli to be a Detroit member of the Mafia, Cosa Nostra?" Even in the limited portion of the grand jury record disclosed to petitioners after indictment, there were several additional prosecutorial suggestions to the grand jury of fear on the part of witnesses and threats of force—despite the fact that no witness testified to threats or fear. The grand jury's deliberations were tainted by an atmosphere of potential violence created out of whole cloth by the Department of Justice. The re-

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* See *Wisconsin v. Constantineau*, 400 U. S. 433 (1971).

** Without access to the full confidential Department of Justice files (cf. *United States v. Berrios*, — F. 2d —, 15 Cr. L. 2508 (2nd Cir. Aug. 8, 1974)), petitioners can only speculate on the role played by this "enemies list" in the convening of the grand jury.

sulting indictment should have been dismissed. Cf. *Alexander v. Louisiana*, 405 U. S. 625 (1972), and *Peters v. Kiff*, 407 U. S. 493 (1972).

The prejudicial consequences of the smear of petitioners Zerilli and Polizzi did not end with the indictment of the seven defendants in this case. Despite a pretrial recognition by the Court of the prejudice of the "Mafia" reference and a direction to the prosecutor to avoid any such reference (R. T. 2/14/72, p. 29), the prosecutor, on cross-examination of Zerilli, attempted to establish that Zerilli's reputation was bad, and, for that reason, that Zerilli believed he was not licensable in Nevada (26 R. T. 5117-5119, 5197-5199). Later, the prosecutor was aided by the Court in compelling Polizzi to admit that his licensing problem was rooted in a defamatory accusation which placed him on a "Mafia list" (28 R. T. 5450-5466).

The original opinion of the Court of Appeals treated the prosecutorial attacks on the reputations of Zerilli and Polizzi as error, albeit "harmless error" (App. A-36 to A-37). The amended opinion (App. C-2 to C-3), following petitions for rehearing addressed, inter alia, to the misuse of the harmless-error rule (see Question VI of this petition), sanctioned both episodes as proper prosecution techniques, despite the rule of *Michelson v. United States*, 335 U. S. 469 (1948); it approved the prosecution's attack on the reputation of the accused, which had not been put in issue by the accused, supposedly because a bad reputation might be relevant to establish the defendant's motive to commit the crime charged.* *Michelson* condemns any detour

* Motive is an issue in most criminal prosecutions. Is the Court of Appeals suggesting that reputation evidence may be introduced by the prosecution in any case? We are not concerned here with that line of cases which permits the prosecution to prove the defendant's use of reputation as a weapon to induce fear, an element in the crime of extortion. See, e.g., *Carbo v. United States*, 314 F. 2d 718, 739-742 (9th Cir. 1963), cert. den. 376 U.S. 953, reh. den. 377 U. S. 1010, and *United States v. Billingsley*, 474 F. 2d 63, 65-66 (6th Cir. 1973).

into the area of the accused's reputation unless it is initiated by the accused, and states (1. c. 475-476):

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. * * * [The law] simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

See also *United States v. Stephens*, 492 F. 2d 1367 (6th Cir. 1974).*

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* The error under *Michelson* was aggravated by the Court's subsequent order aborting petitioner Polizzi's attempt to rehabilitate himself on redirect examination from the prosecutor's attack on his reputation. When Polizzi's counsel tried to elicit the fact that Polizzi's accuser had slandered him under conditions of absolute privilege in the Congress—so that Polizzi could not obtain public redress of the false accusation—Polizzi's rehabilitation was foreclosed by the prosecutor's sidebar objection based upon his false characterization of the contents of unlawful FBI "bugging" logs. Compare App. A-72 to A-73 with Exhibit 3 on Motion to Suppress. The Court of Appeals opinion is misleading when it states that after the bench-side conference about the logs, "the line of questioning about the Mafia was dropped by Polizzi's counsel . . ." (App. A-73). Contrary to the implication that Polizzi voluntarily abandoned this line of attempted rehabilitation, he was, in fact, prevented from pursuing rehabilitation on the "Mafia" issue when the judge told counsel at sidebar: "I don't want this gone into any further." (29 R. T. 5582).

The reputation-"Mafia" attack was mounted again in the prosecutor's summation to the jury. He not only talked of "good old fashioned Chicago type extortion" (39 R. T. 7983), but he again attached the "Mafia" label to petitioner Polizzi and also, contrary to the record, to petitioner Zerilli (39 R. T. 8004). He later retracted the statement as to Zerilli, but reemphasized Polizzi's alleged "Mafia" association (43 R. T. 8682-8683) and ended with the sinister comment as to all defendants: "And these businessmen have learned it is better to use a corporate resolution than a pistol." (43 R. T. 8683). The revised opinion of the Court of Appeals (App. C-2) was in error in stating that "there was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied." The repeated government misuse of the organized crime label and the "Mafia list" required a new trial under *Berger v. United States*, 295 U. S. 78 (1935).

The prejudicial effect of the "Mafia" enemies list appeared outside the judicial record as well. In substantial newspaper and other publicity of the trial, Zerilli and Polizzi were repeatedly described as "alleged members of organized crime", "alleged members of the Mafia" and/or "Cosa Nostra" or "reputed chiefs" thereof. The jury was not sequestered and was not prohibited from reading the newspapers during the trial; the trial judge contemplated in his cautions to the jury that they might read newspaper headlines about the case (App. A-23, fn. 41; R. T. 2/14/72, p. J87-88; 7 R. T. 1331). At one point in the trial a headline read "TRANSCRIPT SHOWS U. S. BUGGED VEGAS DEFENDANTS' MAFIA TALKS" (9 Z.C.T. 2539), a result of the press improperly reporting a benchside conference in which the prosecutor falsely characterized the contents of the so-called Polizzi "bugging" log to abort Polizzi's attempt to rehabilitate himself after the prosecutor's attack upon his reputation (29 R. T. 5576-5582). The news reporter got the story from the prosecutor's copy of the transcript! (30 R.T. 5786-5789, 5798).

The former Attorney General created and published, without notice to petitioners Zerilli and Polizzi or opportunity to be heard, a special kind of "enemies list"—not a list of political enemies to be used for partisan purposes, about which we have been educated in the last year, but a list of targeted individuals intended to be treated as enemies of the state. That list carried with it a unique, constitutionally invalid sanction to use in the judicial record the label "Mafia", "Cosa Nostra", and similar sinister, pejorative terms implying organized criminal behavior —from the grand jury stages through the Court of Appeals— and in the press reports of the trial. That list fostered an injudicious atmosphere in this prosecution, giving putative legitimacy to a trial of the reputations of Zerilli and Polizzi in plain violation of the *Michelson* rule.* All defendants were prejudiced by the attack on reputation. In this case, from August 12, 1969, through the denial of rehearing in the Court of Appeals on July 25, 1974, all petitioners were essentially deprived of the presumption of innocence by the government's creation and use of a list of public enemies.

This case reflects a pattern of overwhelming injustice against petitioners. It had its birth in a flagrantly unconstitutional communication by the Attorney General of the United States to a Senate Committee and published in the Congressional Record. The prejudice engendered by the Attorney General's unconstitutional utterance generated a grand jury which in turn was irretrievably poisoned against two target defendants—Zerilli and Polizzi—and inevitably against their alleged associates.

From that grand jury came an amorphous charge as elusive as mercury. In the trying of the issues of this case, if there can be said to have been issues, the trial jury was oversated

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* See also the seemingly ad hominem application of the Travel Act (18 U.S.C. § 1952) and Nevada Revised Statutes, Section 463.160(1)(c), to petitioners by the Court of Appeals (App. A-7 to A-8).

not only with confusing matter but with highly prejudicial matter. No jury could have disgorged itself of the poison it was fed. The currently stinging and cruel epithet "Mafia" was branded by a hot iron upon all petitioners, however innocent they might be of such disgrace.

Thus, men of Italo-American heritage and their co-defendants present themselves to this Court with the same hope and urgency as did their forebears in unpopular causes, leaders of the Afro-American community and leaders of the Organizations of Laboring Men.

Because of conflicts in the opinion of the Court of Appeals with decisions of this Court, because of the effective denial to petitioners of due process of law and the right to a jury trial, and because of the unconstitutional application of the un-American concepts of character assassination and guilt by suspicion and association, we respectfully suggest that certiorari should be granted as to this Question.

II

Prejudicial Publicity

Petitioners argued in the Court of Appeals that the volume of the prejudicial publicity, with evidence that it reached the jury, deprived them of a fair trial. The Court of Appeals devoted the largest single portion of its opinions to this issue. See Section IV, App. A-19 to A-33. The Court characterized the problem as "not insignificant" (App. A-33).

To summarize, there was newspaper publicity in both the major Los Angeles papers during almost every one of the 48 days of trial. Petitioners moved several times for mistrial on account of prejudicial publicity. On three occasions, the judge interrogated the jury in the absence of defense counsel

and petitioners—twice during trial (7 R.T. 1326-1349 and 31 R.T. 6009-6024) and once immediately after the verdict (46 R.T. 8991-9028). During the trial, petitioners were not even informed of the judge's intention to question the jurors until after his inquiry had been completed. After the verdict, petitioners requested the opportunity to be present during the voir dire of the jury. The judge refused, stating: "I have no intention of allowing that to happen. I will not have any counsel in but I will have the reporter present." (46 R.T. 8988).

A. Six weeks after conviction, juror Palmer voluntarily appeared at the hearing on motions for new trial. He volunteered a statement to one of petitioner's counsel, indicating that the jury had been reading the newspapers throughout the course of the trial and that the publicity had had a "devastating" effect on the defendants. Attorney Weinstein immediately made an offer of proof to the trial Court as to what he had been told and requested that Palmer be sworn and questioned. The Court refused to allow Palmer to testify and suggested that petitioners attempt to secure his affidavit (48 R.T. 9088-9090). Palmer refused to give an affidavit, but a licensed private investigator who interviewed him did make an affidavit (see App. D hereto) in which the investigator testifies that Palmer confirmed that Mr. Weinstein had accurately reported what Palmer had told him. Moreover, Palmer told the investigator that thereafter the prosecution had suggested to Palmer that he had no business being there and that he should leave the court room, which Palmer did, "for (his) own good."

A review of the three voir dire interrogations conducted by the trial judge substantiates Palmer's post-verdict revelation. Jurors admitted that they had seen articles. On one occasion an especially prejudicial article which had motivated the judge sua sponte to conduct a voir dire was then in the jury room. The interrogations of the jury by the trial judge were incomplete. See, for example, 7 R.T. 1325-1326, where the first juror ques-

tioned revealed that the newspaper was in the jury room, but the Court failed to ask any other juror of the incident or to inquire who had brought it there. Palmer's post-verdict disclosures and the consistency of his story as shown by the investigator's affidavit indicate what a timely and penetrating interrogation could have produced.

The trial Court's failure to conduct proper investigations, sanctioned by the Court of Appeals, conflicts with numerous decisions of this Court in the area of prejudicial publicity. See *Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Estes v. Texas*, 381 U. S. 532, 543 (1965); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Janko v. United States*, 366 U. S. 716 (1961) (see esp. Solicitor General's memorandum confessing error), *Irvin v. Dowd*, 366 U. S. 717 (1961); *Chapman v. California*, 386 U. S. 18, 43-44 (1967), and *Marshall v. United States*, 360 U. S. 310 (1959). There is also conflict with numerous decisions of Courts of Appeals—*United States v. Colabella*, 448 F. 2d 1299 (2nd Cir. 1971); *United States v. Rattenni*, 480 F. 2d 195 (2nd Cir. 1973); *United States v. Kum Seng Seo*, 300 F. 2d 623 (3rd Cir. 1962); *Marson v. United States*, 203 F. 2d 904, 911 (6th Cir. 1953); *Margoles v. United States*, 407 F. 2d 727, 731-734 (7th Cir. 1969); *United States v. Thomas*, 463 F. 2d 1061, 1065 (7th Cir. 1972), and *Mares v. United States*, 383 F. 2d 805, 809 (10th Cir. 1967).

The trial Court's refusal to allow Palmer to testify and the affirmance by the Court of Appeals are in direct conflict with *United States v. Thomas*, 463 F. 2d 1061 (7th Cir. 1972). We believe this case cannot be distinguished. The mandate of *Thomas* is unequivocal:

> "We find that there was a sufficient showing of juror exposure to prejudicial evidence to have prompted further investigation on the part of the trial judge. As in United States v. Palermo, 410 F. 2d 468 (1969), we find that this failure necessitates a new trial. Remand for the purposes

> of investigating the jury would be fruitless at this point, over two years after the close of the original proceeding. Moreover, we cannot agree that an error of this gravity, which calls into question the integrity of the jury's deliberations, can be characterized as 'harmless,' under Chapman v. California, 386 U.S. 18, 82 S. Ct. 824, 17 L.Ed. 2d 705 (1967)." (463 F. 2d at 1065).

B. Not only was the trial Court's investigation deficient in the light of these cases, but the Court's procedure which barred petitioners and their counsel from any voir dire interrogation of the jurors deprived them of their right to be present during all stages of the proceedings, contrary to the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. See also Rule 43, F. R. Cr. P., and *Lewis v. United States*, 146 U. S. 370 (1892).

In *United States v. Palladino*, 475 F. 2d 65, 75 (1st Cir. 1973), the First Circuit ruled that an in camera examination of a juror who had indicated his discomfort with the subject matter of the case should have been made in the presence of defense counsel. In *United States v. Glick*, 463 F. 2d 491, 493 (2nd Cir. 1972), the Second Circuit held that "private communications between the judge and jury," without notice to defendant or counsel, or affording them the opportunity to be present, "violated the unequivocable mandate of Rule 43, which requires the defendant to be present 'at every stage of the trial.'" In *United States v. McCoy*, 429 F. 2d 739, 742 (D.C. Cir. 1970), the District of Columbia Circuit held that a post-verdict interview with a juror conducted outside the presence of the defendants and his counsel was improper and constitutionally invalid.

The Sixth Circuit invalidated the taking of the jury's verdict in the absence of counsel for the defendant in *United States v. Smith*, 411 F. 2d 733, 736-737 (6th Cir. 1969):

> "From a reading of the record it is impossible to determine the tone of voice of the jurors when they individually announced their decision, the hesitancy of their responses, and other possibilities that could have taken place and had significant meaning. Had counsel been present and something of this nature occurred, the defendant would have had the benefit of his legal advice."

The principal question probed by the trial Court here was whether the jury had succumbed to the effect of repeated media charges linking petitioners with "organized crime", the "Mafia", and "La Cosa Nostra". Petitioners suggest that questioning of the jurors individually in the sanctuary of the judge's chambers tended to validate fears generated by the media contamination. The judge admonished each of the jurors not to be "alarmed". The in camera procedure seems likely to exacerbate juror suspicion and fear of petitioners, and, at the same time, to motivate the jurors to deny any prejudice which they harbored in order to sustain their verdicts and be done with the experience. The extent of prejudice accruing to petitioners from the absence of their counsel during this in camera proceeding is not a matter for speculation and cannot be weighed against the right to be present and have the assistance of counsel.

As this Court wrote in *Glasser v. United States*, 315 U.S. 60, 76 (1942):

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Sixth Amendment right to counsel means a right to be assisted by counsel when professional assistance is likely to be effective in protecting important rights of the accused. Juror Palmer's June 12, 1972, admission, which seriously impeached the jury's verdicts (See App. A-29 to A-30, fn. 49, and App.

D), fleshes out Palmer's guarded statements in the judge's chambers immediately after the verdicts—provocative statements suggesting jury misconduct which were not pursued by the judge (See App. A-30 to A-32, fn. 50). But Palmer's belated confession reveals how after-the-fact inquiry by counsel is an ineffective substitute for on-the-spot confrontation and assistance from counsel in the juror inquiry. With the passage of time, the opportunity to discover the essential truth erodes; the rights of the accused suffer.

Is there serious doubt that if Palmer had been properly questioned on April 26, 1972, by counsel, or by the trial judge with the assistance of counsel, the prejudicial effect on the jury of the media publicity would have been directly established by juror admissions—rather than only tantalizingly and guardedly revealed through Palmer's qualms of conscience?

It is an interesting question for speculation why the trial judge would think that once the verdicts were returned he could do a more effective job of ferreting out the truth as to the effect upon the jury of extrinsic factors if he was unaided by the presence and direct participation of counsel. The jury's work was done. Nothing said to them could interfere with the subsequent performance of their judicial duties. They had no further obligation other than to disclose the fact whether they had been exposed to and discussed the contents of substantial prejudicial publicity. Why should the Court have concluded that the presence and participation of counsel then would not aid the truth-seeking goal of his inquiry?

It is precisely because we cannot second-guess, at the expense of the fundamental and substantial rights at issue, what benefit counsel might have been to petitioners if they had been present, that the procedures followed by the trial Court in secretly interrogating the jury should be reviewed.

Because of the prejudicial publicity, because of the inadequacy of the interrogations of the jurors as to such publicity,

because of the exclusion of counsel and petitioners from the interrogation procedure, because of conflicts in the decision of the Court of Appeals with various decisions of this Court and other Courts of Appeals, and because of the deprivation of fundamental constitutional rights guaranteed in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

III

Illegal Electronic Surveillance

Prior to trial, the prosecution acknowledged that there had been illegal electronic surveillance of Zerilli, Polizzi and Giordano. Transcripts were shown (but not turned over) under very restricted circumstances only to each individual defendant and his counsel—with directions not to discuss the contents with any other defendant or counsel.

A six day post-conviction hearing, ostensibly pursuant to *Alderman v. United States*, 394 U.S. 165 (1969), resulted in the trial judge's finding that the case was untainted by any information derived by the government from the FBI trespassory microphone surveillance (55 R.T. 10,916-18). The government denied the existence of any electronic surveillance of petitioners Shapiro, Bellanca, Rooks, and Emprise Corporation (12 Z.C.T. 3241-72). The substantial FBI "bugging" logs which were turned over to petitioners after the trial* contained considerable

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* The FBI logs purporting to summarize intercepted conversations of petitioner *Zerilli* (Exh. 2 on Mot. to Suppr.) consist of 397 single-spaced typewritten pages covering 23 days during a period of microphone installation spanning 553 days from February, 1963, until July, 1964. The conversations attributed to *Polizzi* (Exh. 3 on Mot. to Suppr.) all occurred on one day in January, 1964, and form a part of the Zerilli logs (Exh. 2 on Mot. to Suppr., at pp. 205-236). The Zerilli logs purport to emanate from a gambling casino in Las Vegas (Exh. 2 on Mot. to Suppr., at pp. 1-10) and from a business

information relevant to the subject matter and theory of this prosecution.**

The logs were read by the prosecution team before the trial began. During the trial, the prosecutor referred to the Polizzi logs, threatened to reveal them to the jury, and, by falsely characterizing their contents to the trial judge (App. A-72 to A-74; 29 R.T. 5576-5582), prevented Polizzi from attempting to rehabilitate himself from the prosecutor's attack on his reputation. (See Question I presented by this petition.) Information was transmitted from the Detroit microphone source to the FBI's Los Angeles field office for use in planning physical surveillance of a visit to Palm Springs by Zerilli and Polizzi (see Exh. 2 on Mot. to Suppr., at p. 322; Exh. L on Mot. to Suppr., 3/7/64 airtel; 6 R.T. 1206-1208; Exh. SVV; Exh. M on Mot. to Suppr.; 53 R.T. 10,670-10,673). At the trial, that meeting became the subject of an offer of proof by the prosecutor.

Despite this extensive and relevant "bugging" material which was in the government's possession and used at the trial, the trial judge did not compel the government to support its repeated denials of taint with admissible testimony from the gov-

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office in Detroit (Exh. 2 on Mot. to Suppr., at pp. 11-397). The *Giordano* logs (Exh. 4 on Mot. to Suppr.) consist of 64 pages of handwritten and typewritten material attributed to conversations in St. Louis on two days in 1963, one day in 1964, and one day in 1965.

** The following passages in the logs were cited to the trial Court and the Court of Appeals as the true source for the government's focus on petitioners and for the theory of this prosecution (neither Court made a specific reference to or finding on the relevance of the material): Exh. 2 on Mot. to Suppr., at pp. 1-10, 64-65, 142, 175-176, 179, 203, 215. The relevance of the Giordano logs to this prosecution was explained in Giordano's memorandum to the trial judge (13 Z.C.T. 3595-3598).

In its original opinion, the Court of Appeals chided petitioners with this final paragraph: "We find it interesting that nowhere in their briefs do defense counsel, who had access to the logs, assert that anything in them was of such a character as to provide any leads

ernment employees who knew the facts on these relevant questions: (i) How many of the seven petitioners were subjected to electronic surveillance? (ii) At what locations and for what time periods was surveillance, if any, conducted as to each defendant? (iii) The identity of each official who directed or participated in the "bugging" of each defendant? (iv) The manner, extent, and use of the information derived from the illegal operation? No admissible evidence was received on any of these basic questions, except to the extent that one FBI agent who participated in some of the surveillance of petitioner Giordano (Robert Bender from St. Louis) was made available for limited testimony but without producing any of his field office's files on the question (53 R.T. 10,488-10,658).

Sixty FBI and Department of Justice officials admittedly had access to the logs in this case (Exh. 6 on Mot. to Suppr.), of whom ten, based in Washington, held supervisory assignments in the FBI and Department of Justice from which they were positioned to feed leads to investigators and prosecutors. The recipients thus could be insulated from knowledge of the true source of tainted information (12 Z.C.T. 3296-3313; 47 R.T. 9046-9079). Of course, covert leads could have emanated from any FBI office possessing the tainted information.*

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or information pointing to or material to the present prosecution" (App. A-78). After petitioners reminded the Court of Appeals that the tainting passages in the logs had been specifically cited in our brief (Pet. for Reh. of Polizzi et al., at p. 19, fn. 16), the Court deleted that passage and, in its amended opinion, did not speak to the question whether the cited portions of the logs might have provided leads or information relevant to the prosecution. The Court of Appeals was satisfied with the prosecution team's unsubstantiated disclaimers of taint (App. A-77).

* The FBI and Department of Justice officials on the log access list were widely scattered: 10 in Washington, D.C., 19 in Detroit, Michigan, 11 in St. Louis, Missouri, 9 in Las Vegas, Nevada, and 11 in Los Angeles (7 of them were from the prosecution team) (Exh. 6 on Mot. to Suppr.)

Henry Peterson was on the access list. For part of the time embraced by the bugging of petitioners and the trial, Peterson was the principal lawyer in the organized crime and racketeering section. For the balance, he was the assistant attorney general in charge of the entire criminal division of the Department of Justice. At all times when he had access to the logs, he was in a position to influence investigative and prosecutive decisions in this case. It was admitted that before the investigation began in Los Angeles, Peterson had urged the United States Attorney that information against Zerilli and Polizzi should be "vigorously pursued by the FBI and U. S. Attorney's Office" (Exh. 16 on Mot. to Suppr., FBI serial 92-3975-1, dated 3/2/70). Despite the government's burden to prove no taint (App. A-72), the Court would not require the prosecution to produce Mr. Peterson for testimony. When petitioners offered to bring him from Washington, he proved to be unavailable within the time permitted by the Court (54 R.T. 10,754-10,-759, 10,881-10,882).

Two other crucial government witnesses, both FBI agents, were not produced for testimony about the true source of their intelligence reports, attributed to "reliable sources," covering petitioners' alleged association in the Frontier Hotel with the government's principal witness Friedman (49 R.T. 9521-9544, 50 R.T. 9563, 9566). When petitioners offered to produce these agents from the East, at petitioners' expense, the Court made it clear that it would not countenance inquiry into the identity of the "reliable sources" (52 R.T. 10,474-10,476).

Despite petitioners' urgent requests, none of the FBI agents who monitored the output of the illegal microphones in this case was produced to establish exactly what was overheard, what was recorded, and what was done with the fruits of their illegal monitoring of petitioners' conversations. The Court would not even require disclosure of the names and addresses of the FBI monitors (52 R.T. 10,476).

The prosecutor repeatedly represented to the Court in unsworn and incompetent statements that he had turned over to the Court and counsel all fruits of the interceptions of petitioners' conversation. But again and again, tainted FBI airtels and reports surfaced as the *Alderman* hearing progressed, evidencing extensive dissemination of the fruits of the electronic monitoring to FBI divisions in many parts of the nation. See and compare some of the late-to-surface FBI airtels from the "bugs" (Exhs. 8, 9, 16 (p. 4), and L on Mot. to Suppr.) with the prosecutor's assurances that such fruits of the "bugs" did not exist (12 Z.C.T. 3249-3251, 3256-3262, 3270; 47 R.T. 9071-9073). At the time of the prosecutor's negative representations, some under oath, he was in possession of documentary evidence from Washington proving that the non-existent fruits of the "bugs" were in the possession of the Department of Justice (Exh. 1 on Mot. to Suppr., affidavit of special agent McCarthy (App. E hereto); Exh. 10 on Mot. to Suppr.; 52 R.T. 10,397-10,406; 50 R.T. 9674-9688).

On such a record, taint may not be negated solely by testimony from the prosecution team that they are unaware that any leads ultimately sprang from an electronic source. Yet that is the procedure which has been approved by the Ninth Circuit (App. A-76 to A-78). Before the *Alderman* hearing began, the trial judge recognized that taint could not be negated solely by proof that the prosecution team believed they had a "clean" case, so long as there existed a real possibility that tainted leads were transmitted to the prosecution team by officials who had access to the fruits of the "bugs" (47 R.T. 9073). But the prosecution was never required to, and did not, produce competent evidence that tainted leads were not injected into the investigation of the case in a manner calculated to disguise their true source. In fact, FBI reports carried an underscored warning that information from electronic sources, "if utilized, should be carefully paraphrased in order to further protect the identity of this source. This information is not to be distributed without Bureau authority."

Two weeks before the *Alderman* hearing began, the Court properly ordered the government to produce at the hearing all officials who had access to the fruits of the "bugs" (12 Z.C.T. 3294). The next day the Court rescinded the order (12 Z.C.T. 3321). The Court of Appeals noted that petitioners produced none of the 60 officials on the access list (App. A-78), even though the Court recognized that the burden of proof of no taint was on the government (App. A-72). It would have been economically impractical for petitioners to bear that burden where forty of the percipient witnesses were employed by the government east of the Rocky Mountains, and the hearing was in Los Angeles (Exh. 6 on Mot. to Suppr.).

Another panel of the Ninth Circuit has recognized the importance of the government having to make its *Alderman* showing in a manner which at least insures that the discipline of the perjury statute will apply to the government's affiant. *United States v. Alter*, 482 F. 2d 1016, 1026-1027 (9th Cir. 1973). The only affidavit in this case which colorably lays a foundation for the parameters of electronic surveillance and the dissemination of its fruits, an affidavit of special agent McCarthy (see App. E hereto), does not begin to satisfy the evidentiary requirements for proof either of the existence or the non-existence of a government record (see Rules 44, F. R. Civ. P., and 27, F. R. Cr. P.). Special agent McCarthy was curiously vague in his affidavit on a number of essential facts. What records in the FBI were available to him in order to perform the inquiry? What is the identity of "all logs and airtels which were previously furnished to the United States Department of Justice"? When were they furnished? To which of the defendants did they relate, if any? When were the "original tape recordings relating to the transcripts submitted in this case . . . routinely destroyed", and by whom?

Other documents were submitted about the same time as the McCarthy affidavit. One was a letter dated July 20, 1971 from the chief of the organized crime and racketeering section (Wil-

liam S. Lynch) to the United States Attorney in Los Angeles listing the microphone sources that were known to intercept the voices of three of the petitioners. It is silent on how the fruits of the disclosed monitoring were disseminated and used. Another was an unsworn transmittal memorandum without signature purporting to emanate from the FBI Director on August 2, 1971, addressed to the Special Agent-in-Charge of the FBI's Los Angeles office. That memorandum refers to an earlier FBI letter to the Department of Justice dated May 28, 1971 (Exh. 10 on Mot. to Suppr.). None of these letters is under oath. The prosecutor's affidavit of May 19, 1972, appears to be a recapitulation of these incompetent and unsworn documents (12 Z.C.T. 3241-3272).*

The end result is that there are no competent documents, submitted under the penalties of perjury, and no oral testimony whatsoever to establish whether and to what extent any of the seven defendants was subjected to illegal electronic surveillance. The essential defect in the government's *Alderman* representation is that it was apparently intentionally structured in the form of unsworn, incompetent statements on the crucial facts which the Court must know in order to make a finding whether

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* The prosecutor's memorandum and affidavit of May 19, 1972, falsely attributed the "sole source of this entire prosecution, the source of (the government's) investigation, *the source of all its evidence*, the source of its theories, its preparation for trial and presentation at trial. . . ." to an interview with Maurice Friedman in the United States Attorney's office in Los Angeles on February 18, 1970 (12 Z.C.T. 3254-3255; emphasis in the original). But petitioners proved conclusively that the United States Attorney's office had the central thesis of this prosecution at least a year earlier when Friedman was sentenced (12 Z.C.T. 3307-3309, 3312-3313; Exh. 5 on Mot. to Suppr.). The prosecutor's deception on the true source of the case urgently required a penetrating evidentiary inquiry into the entire route by which the electronic "poison" was disseminated from the three known "bugs" by the F.B.I.

Furthermore, Friedman testified at the trial that he had never met Giordano (6 R.T. 1177). The source as to Giordano must have been the Giordano logs, as explained in the Giordano memorandum to the trial judge (13 Z.C.T. 3595-3598).

the case was tainted by impermissible evidence or leads to evidence as to each or any of the alleged conspirators.

Courts of Appeals are in some disagreement on the requirements for a negative finding on the existence of electronic surveillance. The Seventh Circuit seems to require a negative representation in the form of an affidavit by the United States Attorney or the head of a federal agency. *Korman v. United States*, 486 F. 2d 926, 931 fn. 10 and accompanying text (7th Cir. 1973). The Third Circuit will accept an unsworn letter from an assistant United States attorney. *United States v. D'Andrea*, 495 F. 2d 1171, 1173 (3rd Cir. 1974). The Ninth Circuit seems to be in conflict. In the instant seven-defendant conspiracy prosecution, where extensive unlawful surveillance was confessed as to three defendants, the Court of Appeals has accepted the assistant United States attorney's negative affidavit based upon inconclusive, vague and incompetent documents. See also *United States v. Fitch*, 472 F. 2d 548, 549 (9th Cir. 1973). On the other hand, in a grand jury investigation, another panel in *United States v. Alter*, 482 F. 2d 1016, 1026-1027 (9th Cir. 1973), rejects a negative affidavit of a United States attorney unless it clearly subjects him to the penalties of perjury.

The Second Circuit has held that where there is conclusive evidence of improper electronic surveillance, e.g., where, as here, it has been confessed by the prosecution, the government's evidentiary burden should be higher. Chief Judge Kaufman wrote in *United States v. Huss*, 482 F. 2d 38, 50-51 (2nd Cir. 1973):

> "The teaching of the Supreme Court in Alderman v. United States, *supra*, cannot be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not *in camera* decisions by the court, which

> must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing. Here, the logs represent only a monitor's summary of the intercepted conversation. In a case such as this, however, with doubt cast upon the government's proof by their main witness's own admission of knowledge of the wiretap, we cannot ignore the significance to the adversary character of the taint hearing of the destroyed records." (footnotes omitted).

The Second Circuit pointed out that where the record was in conflict on how the fruits of the taps were disseminated within the FBI, competent courtroom evidence would not be obviated by argument and prosecutor representation (482 F. 2d at 50, fn. 9):

> ". . . The record is even silent as to the name of the government agent who supervised that wiretap. The government did not call any of that monitors to testify, although it represented at oral argument that the tapes were heard only by the monitors. *We cannot accept these representations in lieu of evidence.*" (Italics supplied.)

None of the monitors was called in this case because the trial Court did not "see the materiality of" the potential testimony of the monitors (52 R.T. 10,476). The Ninth Circuit's rejection of the monitors' testimony (App. A-78) is in conflict with the procedure followed in numerous decisions of other Courts: *United States v. Stassi*, 431 F. 2d 353, 354 fn. 6, 355 fn. 9 (5th Cir. 1970), *Baker v. United States*, 430 F. 2d 499, 500 fn. 4, 501-502 fn. 7 (D.C. Cir. 1970), cert. den. 400 U.S. 965 (1970), *United States v. Clay*, 430 F. 2d 165, 168-169 fn. 6 (5th Cir. 1970), rev. on other grounds 403 U.S. 698 (1971); *United States v. Ivanov*, 342 F. Supp. 928, 930-935 (D.N.J. 1972). Washington-based FBI supervisors have also been required to testify in order to reveal the handling of monitored information. *United States v. Alderisio*, 424 F. 2d 20, 24 (10th Cir. 1970), *United States v. Giordano*, 440 F. 2d

449, 451 (6th Cir. 1971), aff'd after remand, 450 F. 2d 43 (6th Cir. 1972).

The failure to require FBI monitors' and supervisors' testimony was particularly prejudicial in the instant case because of the unique facts here. The prosecutor possessed and used the logs during trial (29 R.T. 5576-5582). A large quantity of files in the control of James Ritchie, a Detroit-based Strike Force attorney who was on the log access list, were borrowed by the Los Angeles prosecution team and returned before the indictment. No competent evidence was produced as to the contents of those files or their sources. Ritchie actually questioned witnesses before the grand jury in this case, and although he was on the access list for the electronic information, the Court did not require his testimony at the hearing (Exh. 6 on Mot. to Suppr.; 52 R.T. 10,322-10,323; 49 R.T. 9346-9351, 9372-9375; 50 R.T. 9641-9642, 9769-9770, 9783-9786; 52 R.T. 10,272-10,277, 10,291-10,302; 53 R.T. 10,693-10,699).

Despite a six-day *Alderman* hearing with substantial electronic material found in the FBI's Detroit, St. Louis, Las Vegas, and Los Angeles field office files, the Courts below declined to require the government to show by evidence (rather than by representation) that the FBI "poison" was not filtered through as blind leads to the prosecution team. Petitioners were entitled to a full hearing on this issue, in which the prosecution should have been required to make full disclosure and produce all witnesses for examination before the Court could have determined whether the government had sustained its burden of proving the non-existence of taint from the illegal conduct.

The federal courts have had sufficient experience in taint hearings in the five years since *Alderman* to reveal several areas in which procedural guidance by this Court is required. This case presents a fair spectrum of those *Alderman* conflicts which have emerged in the several Circuits that have dealt with the

difficult balancing of interests peculiar to governmental electronic surveillance.

Because of the conflicts which have developed and the need for clarification and guidance by this Court, we respectfully suggest that certiorari should be granted as to this Question.

IV

Jencks Act—Lands Transcript

A. Prior to trial, certain guidelines had been established by the District Court for production of material under the Jencks Act (18 U.S.C. § 3500). With reference to the government's principal witness, Maurice Friedman, the final order was to deliver the material when the jury was sworn. The prosecutor delivered some material but not what came to be known as the Lands transcript.

During the third day of cross-examination of Friedman, counsel for one of the petitioners, having been assured by the prosecutor's conduct that all prior statements of the witness had been furnished, asked him if it was not true that it was not until after he had been convicted and sentenced for perjury and attempted bribery of a witness that he first told someone "anything about a hidden interest" (8 R.T. 1573). Almost as if this was the opening that the prosecutor and the witness were waiting for, Friedman answered, "Long, long before. The time was during the Friars Club investigation in 1967." (8 R.T. 1574). A motion under the Jencks Act was renewed (8 R.T. 1576-1591), and the prosecutor produced a tape recording and transcript of Friedman's conversation on October 26, 1967 with Dr. Victor Lands (Exh. SUU for Ident.)*

* Friedman and Dr. Lands were co-conspirators and joint indictees in the Friars Club case. The recording was made by Dr. Lands, apparently without the knowledge of Friedman, and in the course of their discussion about the Friars Club matter, Friedman referred to his Frontier Hotel activities.

The prosecutor desperately sought to justify his blatant violation of the Jencks Act (8 R.T. 1577-1578), but the Court ordered the transcript produced. The treatment by the Court of Appeals of this violation of the Jencks Act (see Section VIII of opinions below, App. A-44 to A-45) is first to suggest that it may not have been a violation, but then to hold that the untimely production "was not prejudicial" (App. A-44),* and that the use and abuse of it thereafter was error, but not "so prejudicial as to require reversal" (App. A-47).

The failure to produce the Lands transcript was a clear violation of Section 3500, which defines "statement" in sub-section (e) (2):

> "A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

The Court of Appeals states (App. A-44) that disclosures are required only for impeachment purposes, but there is no such limitation in the Jencks Act. By Section 3500 (b), the United States must "produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." Nowhere does it indicate that it may only be used for impeachment purposes based upon the government's subsequent use of the Lands transcript as a purported prior consistent statement, it was certainly a statement related to the subject matter as to which Friedman had testified.

The prosecutor having failed to comply with the mandate of the Jencks Act, petitioners' motion under § 3500(d) to strike his

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* Had it been timely produced as required, the entire cross-examination of Friedman—at least that part which elicited the surprising answer—would have been different.

testimony (8 Z.C.T. 2214-2217) should have been granted, or, at the very least, petitioners' motions for mistrial (10 R.T. 1989-1990, 8 Z.C.T. 2221, 11 R.T. 2277-2279) should have been granted.

The Jencks Act is probably the most used but perhaps most misunderstood procedural statute in the trial of federal criminal cases. With every witness it is called into use. To sanction clear abuses of the mandate of the law, even under the umbrella of the "harmless-error" doctrine, encourages further abuse. Only this Court can stop the practice.

Because of the conflict of the decision of the Court of Appeals with the clear mandate of *Jencks v. United States*, 353 U.S. 657 (1957), and 18 U.S.C. §3500, and because of the importance of this question in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

B. Friedman's grand jury testimony and FBI interviews, produced before his testimony, indicated that he had never made a claim that there were "hidden interests" in the Frontier Hotel. He acknowledged that he had told the FBI that there were no hidden interests (8 R.T. 1573). Then suddenly he revealed the existence of the recorded Lands transcript (8 R.T. 1573).

But when the Lands transcript finally surfaced, it was apparent that the words "hidden interest" had not been used by Friedman. Nevertheless the prosecutor, by maneuvers encouraged by the Court, convinced the jury that the transcript, which was not in evidence, stated that Friedman had said that petitioners Zerilli and Polizzi had hidden interests.

In an attempt to keep out of the trial the words "Mafia" and "Cosa Nostra", a commendable desire which did not persist

later in the trial (see Question I presented by this petition), the prosecutor, with the blessing and direction of the Court, proceeded by leading questions to elicit from Friedman the outrageous misrepresentation that he had said in the conversation with Dr. Lands that "certain hidden interests in that casino were going to come out," and that when he used the phrase "hidden interests" (which of course had never been used) he was referring to petitioners Zerilli and Polizzi (10 R. T. 2000). Such a falsification of the record was a fraud by the prosecutor, countenanced by the Court. Subsequently the prosecutor, in closing argument, reiterated that, as early as 1967, Friedman had mentioned petitioners Zerilli and Polizzi as holding hidden interests in the hotel (39 R.T. 7985-7986).

The Court of Appeals (App. A-46) finds error in the handling of the Lands transcript and says: "The court thus should not have admitted any testimony referring to the Lands transcript." But the Court finds (App. A-47) "in light of the substantial evidence" (never discussed by the Court in its opinions) that the error was not "so prejudicial as to require reversal."

That the whole matter was indeed prejudicial was demonstrated by the fact that the jury requested a re-reading of the evidence pertaining to the Lands transcript (46 R.T. 8953). The prosecutor objected but the defense agreed that the testimony should be re-read to the jury (46 R.T. 8955-8957); the Court, however, told the jury that the Court and "counsel" preferred that the testimony not be re-read, and the jury withdrew the request (46 R.T. 8964). The jury having requested that just two brief portions of the testimony of a long trial be re-read, it obviously was a very significant aspect of the case in the minds of the jury, and there was no basis for the Court of Appeals to conclude that the error was harmless. The trial Court's action was clearly contrary to the American Bar Association Project on Standards for Criminal Justice, Standards Relating to Trial by Jury, Section 5.2(a).

The deliberate misrepresentation to the jury by a government witness, under the leading direction of government counsel at the suggestion of the Court, violated petitioners' rights. In sanctioning such misrepresentation, the opinion of the Court of Appeals is in conflict with opinions of this Court such as *Napue v. Illinois*, 360 U.S. 264 (1959), and *Mooney v. Holohan*, 294 U.S. 103 (1935). See also *United States v. Achtenberg*, 459 F. 2d 91, 98-99 (8th Cir. 1972), and *DeChristoforo v. Donnelly*, 473 F. 2d 1236, 1240-1241 (1st Cir. 1973). Cf. *United States v. Ash*, 413 U.S. 300, 320 (1973).

Because of the conflict of the opinion of the Court of Appeals with decisions of this Court and other circuits, and because the Court of Appeals has sanctioned deliberate misrepresentations by the prosecution to the jury, we respectfully suggest that certiorari should be granted as to this Question.

V

Leniency Agreements (Giglio)

Maurice Friedman was the prosecution's principal witness. At the time of his testimony, he was serving sentences for twenty-seven felony violations of federal law in three separate prosecutions, including Travel Act (card cheating),* theft of grand jury transcripts,** and obstruction of justice for bribery of a witness, such sentences having several more years to run.

On February 24, 1972, this Court decided *Giglio v. United States*, 405 U.S. 150 (1972). On March 3, 1972, petitioners moved for disclosure of promises by the prosecution to Fried-

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* See *United States v. Roselli*, 432 F. 2d 879 (9th Cir. 1970), cert. den. 401 U.S. 924, reh. den. 402 U.S. 924.

** See *United States v. Friedman*, 445 F. 2d 1076 (9th Cir. 1971).

man. The trial Court ordered the prosecutor to disclose all promises to Friedman, and the prosecution stated that his only promise was that, if Mr. Friedman testified, "it will be brought to the attention of the parole board . . . It is as normal as blueberry pie." (12 R.T. 2461). The prosecution has steadfastly maintained that that was the totality of their arrangement.

The undisputed facts are:

1. On April 26, 1972, petitioners were found guilty.

2. On May 1 and May 2, 1972, three federal judges signed orders, with the approval of the prosecutor in the instant case, which effectively reduced Friedman's sentences to time served.*

3. On June 13, 1972, the day after petitioners' motions for new trial were denied, Friedman was released from federal custody, free of any conditions.

The opinion of the Court of Appeals (Section X, after changes on the petition for rehearing) holds that there were no undisclosed promises by the prosecution and that petitioners should have been aware of the fact that Rule 35 motions were pending long after the expiration of 120 days. (Actually, the available public record did not reveal the government's agreement to permit untimely consideration of Rule 35 motions; this fact did not become known until September, 1972, when petitioners' counsel ordered transcripts of the oral proceedings.)

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* Two of the judges reduced his sentence under Rule 35, F.R. Cr. P., to "time served"—463 and 775 days after finality of judgments. The third judge "corrected" the judgment to provide for parole eligibility under 18 U.S.C. § 4208(a)(2)—286 days after finality of judgment. Rule 35, of course, retains jurisdiction in the trial judge to modify a sentence for 120 days only. Cf. *United States v. Robinson*, 361 U.S. 209, 224-226 (1960). See also *United States v. Ellenbogen*, 390 F. 2d 537, 540-541 (2nd Cir. 1968), cert. den. 395 U.S. 918, reh. den. 399 U.S. 917.

The Court of Appeals has ignored this Court's rulings in *Giglio*, supra; *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1962), and a host of rulings throughout the circuits which have followed *Giglio*. See, e.g., *United States v. Harris*, 462 F. 2d 1033 (10th Cir. 1972); *United States v. Mele*, 462 F. 2d 918 (2nd Cir. 1972); *United States v. Kaplan*, 470 F. 2d 100 (7th Cir. 1972); *United States v. Tashman*, 478 F. 2d 129 (5th Cir. 1973); *Taylor v. United States*, 487 F. 2d 307 (2nd Cir. 1972); *United States v. Gerard*, 491 F. 2d 1300 (9th Cir. 1972); and *Favor v. Henderson*, 348 F. Supp. 423 (W.D. La. 1972). Cf. *Burkhalter v. Texas*, 493 S. W. 2d 214 (Tex. Ct. Crim. App. 1973). Such conflicts should be resolved by this Court.

* * * * * * * *

Since the submission of this cause in the Court of Appeals, petitioners have discovered two other instances of favored treatment for Friedman which were never disclosed to petitioners. Friedman was involved in a federal investigation of official misconduct at Lompoc Prison Camp—the Department of Justice stopped prosecution of Friedman although other prisoners were tried. (See appellant's opening brief at 49-50, government's brief at 69, and reply brief at 25 in *United States v. Alessio*, pending in the Ninth Circuit Court of Appeals, No. 73-2904.) Secondly, Friedman was housed in an apartment, rather than a prison or jail, for several months prior to and during the trial of the instant case although he was still under federal sentence. Cf. *United States v. Partin*, 493 F. 2d 750 (5th Cir. 1974).

These additional matters of concealed promises and favored treatment were called to the attention of the Court of Appeals in a petition for rehearing and a motion to augment the record, but no remedial action was granted. It is respectfully suggested that this Court consider a remand of this cause for an evidentiary hearing on the factual background of all promises to and special treatment afforded Friedman.

* * * * * * * *

Because of the conflict with decisions of this Court, particularly *Giglio v. United States*, 405 U.S. 150 (1972), and conflict with decisions of other Courts of Appeals, we respectfully suggest that certiorari should be granted as to this Question. In the alternative, we respectfully suggest that the lower Court be directed to conduct further evidentiary hearings as to the promises and inducements furnished to Friedman in exchange for his testimony.

VI

Prejudicial Totality of Errors

On a number of occasions, the Court of Appeals agreed that the trial Court committed error, but held that the error was cured by instructions, or was harmless or non-prejudicial or non-reversible in the light of the "substantial" evidence of the appellants' guilt, or that the jurors had denied that they had been prejudiced, or that the trial Court did not abuse its discretion.

One demonstrable vice of the apparently unique division of labors in the writing of the 78-page tripartite opinions, plus 3 pages of modifications after petitions for rehearing, is that related contentions of error were thus not filtered through the same judicial mind to evaluate the cumulative effect of all of the independent errors. Despite the length of the opinions, the Court of Appeals nowhere summarizes the "substantial" evidence of guilt which overwhelms all of the errors.

It is one thing to say that an error is harmless or not shown to be prejudicial or that there has been no showing of an abuse of discretion. But we respectfully submit that where the entire case is filled with "harmless errors", the totality of such prejudicial error cannot be characterized as harmless. Although each may have been harmless in an otherwise properly conducted

trial, together all of the errors infected the outcome of the trial and rendered the convictions improper.

The combined opinions in the Court of Appeals demonstrate in the Court's own language the manner in which the proceedings below were permeated by the totality of the errors. Without referring to any error not acknowledged by the Court of Appeals—and there were numerous others—we would call this Court's attention to the following:*

1. The failure to advise petitioners before closing arguments that the Court intended to send the information and indictment to the jury was error, "but the failure to do so here is not prejudicial error." The Court found that in view of the detailed instructions,** "we do not find that error prejudicial in any respect." (App. A-15).

2. The instructions on specific intent "could have been more precise." (App. A-16).

3. "Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial." (App. A-17).

4. The trial Court did not include skimming as one of the charges against appellants, and yet the prosecutor's argument on skimming was permitted without admonishing the jury to disregard it; whatever prejudice arose was "cured" by the instructions which did not include a reference to skimming. (App. A-18 to A-19).

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* We have cited all of these findings of error without attempting to point out how each individually was prejudicial. Some have been discussed in other Questions presented in this petition.

** The instructions were lengthy and confusing and read only once; the indictment was always in the jury room during deliberations.

5. The Court could not find such prejudicial publicity as to "require reversal as a matter of law." (App. A-20).

6. The Court acknowledged that there was a "preferable" method to that used by the trial Court in questioning the jurors about a newspaper in the jury room. (App. A-24 to A-25).

7. The trial Court's refusal to conduct a hearing on June 12, 1972, when juror Palmer revealed the effect of publicity on the jury, was criticized, although the procedure requested by petitioners for an immediate hearing "may generally be preferable." (App. A-29 to A-30).

8. After obviously being troubled by the publicity problems at the trial, the Court of Appeals concluded that "no reversible error was committed in the trial Court's handling of the question of prejudicial publicity." (App. A-33).

9. The original opinion stated as to the prosecutor's closing argument about the "Mafia" background that "appellants have failed to demonstrate that the comments contributed to an unfair trial." (App. A-35 to A-36). In the modification of the opinion after petitions for rehearing, the Court avoided the acknowledgment of error, whether or not prejudicial, by stating (erroneously) that there was no express reference to the "Mafia". (App. C-2).

10. The original opinion as to cross-examination of Polizzi and Zerilli found "danger of prejudice", "error to permit the government to begin a line of questioning with a high possibility of prejudice", and "rulings were erroneous" but not prejudicial. (App. A-36 to A-37). In the modification after petitions for rehearing, the Court for the first time blamed Polizzi for the "prejudicial Mafia connection" and reversed itself to argue that there was relevance to the cross-examination of Zerilli on his reputation. (App. C-2 to C-3).

11. The Court found that all of the episodes of misconduct by the prosecutor sanctioned by the trial judge did not "amount to a deprivation of appellants' right to a fair trial." (App. A-37).

12. The prosecutor's arguments conveying the impression that appellants were violent individuals "were not so prejudicial to appellants so as to require reversal." (App. A-38).

13. The Court stated that a reference to Chicago-type extortion "was not proper, however." (App. A-38, fn. 60).

14. The Court suggested error in the trial Court's vouching for the credibility of government witnesses. (App. A-39).

15. The Court found that evidence of Nevada law as a factual matter was "unnecessary, but not prejudicial error." (App. A-39).

16. The prosecutor's inquiry into prior attempts to invest in Las Vegas after such evidence had previously been rejected was not prejudicial "in light of other and substantial evidence supporting the verdicts." (App. A-40 to A-41).

17. The use of a deposition from another case was not "justified" but the Court avoided a decision as to "whether there was error." (App. A-41 to A-42). The Court then decided that there was no prejudice, and that the incident was insignificant. (App. A-42).

18. The Court acknowledged that "there were things said by the prosecution which would have been better unsaid," but appellants were not deprived of a fair trial. (App. A-42).

19. In commenting upon the trial judge's efforts to afford a fair trial, the Court said "errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal." (App. A-43).

20. A clear violation of the Jencks Act "was not prejudicial to appellants" (App. A-44), and "appears clearly to be harmless." (App. A-45).

21. The trial Court "did commit error" in its handling of the Lands transcript, but "in light of the substantial evidence in the record supporting appellants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal." (App. A-46 to A-47).

22. "Appellants also did not suffer prejudice" from the argument on the Lands transcript. (App. A-48).

23. The original opinion stated that petitioners were not prejudiced "as a result of the prosecution's dereliction" in concealing any undisclosed promises to Friedman. (App. A-49). The modified opinion after petitions for rehearing avoided the acknowledgement of error by deleting the sentence. (App. C-3).

24. The Court of Appeals acknowledged an incorrect representation by the prosecution as to available evidence against Giordano in order to avoid a severance. (App. A-58).

25. In addition to the foregoing, there were numerous instances in the opinions of the Court of Appeals which decided the issues on the basis of exercise of discretion or the failure to show an abuse of discretion. See, for example, App. A-14 to A-15 as to sending the statutes and regulations to the jury room, A-15 as to reading the indictment and sending copies to the jury room, A-22 as to pretrial publicity, A-22 as to investigations of the effects of publicity, A-48 as to the jury's request for a re-reading of the testimony concerning the Lands transcript, A-55 to A-57 as to various motions to transfer the cause and for change of venue, A-76, fn. 8, as to names of informants, and C-3 as to cross-examination re the "Mafia".

Although we recognize that the doctrine of "harmless error" is a necessity in the administration of justice, we believe that this

case presents an example of the dangerous trend among courts to characterize too many important errors as harmless and non-prejudicial. The constitutional rights to fair trials and due process of law are being eroded. It would be appropriate for this Court now to review this current trend and to reestablish guidelines for lower courts to follow.

This Court in *Kotteakos v. United States*, 328 U. S. 750, 758-766 (1946), cautioned against a broad application of the harmless error doctrine, and stated (l. c. 765):

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Individually all of the errors recognized by the Court of Appeals were serious and affected the process by which petitioners were convicted. In the aggregate they adversely affected the substantial rights of petitioners to a fair trial. Their cumulative effect was prejudicial. Cf. *Getchell v. United States*, 282 F. 2d 681, 691 (5th Cir. 1960).

In *Chapman v. California*, 386 U. S. 18 (1967), this Court again discussed the harmless-error rule in the setting of constitutional error and placed the burden on the prosecution not only to show that the error was harmless, but to convince the Court that it was harmless beyond a reasonable doubt. We respectfully submit that the Court of Appeals has disregarded the *Chapman* mandate, especially in those instances where there was a vague reference to undocumented "substantial evidence," or where it

was said that there had not been a showing of abuse of discretion. See also *Kastigar v. United States*, 406 U. S. 441, at fn. 55 and accompanying text (1972), and *United States v. Johnson*, 487 F. 2d 1318, 1325-1326 (5th Cir. 1974). The Court of Appeals has failed to make any finding that the many errors, a number of which are of constitutional magnitude, were harmless beyond a reasonable doubt, and the record would not support such a finding.

The fact that the jury deliberated for five days and asked for a rereading of certain evidence (46 R. T. 8953) would indicate that the evidence was not substantial, but instead that it was a very close case. Cf. *Osborne v. United States*, 351 F.2d 111, 118 (8th Cir. 1965). Any one or more of the many errors could have tipped the balance.

Especially where it is claimed that the evidence clearly shows guilt, we believe that there is a current tendency among numerous lower federal courts, including the Ninth Circuit in the instant case, to disregard the clear instructions by this Court in *Bollenbach v. United States*, 326 U. S. 607, 614-615 (1946).

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> ". . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate

judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Nowhere did the Court of Appeals indicate the nature of the "substantial evidence" against petitioners. The many errors were involved in a significant portion of the prosecution's presentation. Petitioners were required to rebut on irrelevant issues found by the Court of Appeals to be error. The totality of these errors, and the further errors which they produced, were prejudicial.

Because of the application by the Court of Appeals of the harmless-error doctrine in a manner contrary to guidelines established by decisions of this Court, because of the necessity of halting further erosions by many lower courts of the principles of fair trial and due process of law, and because of the importance of this issue in the administration of criminal justice within the concept of constitutional traditions, we respectfully suggest that certiorari should be granted as to this Question.

VII

Other Reasons

Petitioners were tried jointly with Anthony Giordano and Emprise Corporation, and their convictions were jointly affirmed by the Court of Appeals. Both are filing separate petitions for a writ of certiorari which present questions affecting these petitioners.

In the interests of brevity, petitioners hereby adopt the questions presented to this Court by their co-defendants, and respectfully urge that certiorari should be granted as to such Questions.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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